

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JANET L. YELLEN,)
SECRETARY OF THE TREASURY,)
Petitioner,)
v.) No. 20-543
CONFEDERATED TRIBES OF THE)
CHEHALIS RESERVATION, ET AL.,)
Respondents.)

ALASKA NATIVE VILLAGE CORPORATION)
ASSOCIATION, INC., ET AL.,)
Petitioners,)
v.) No. 20-544
CONFEDERATED TRIBES OF THE)
CHEHALIS RESERVATION, ET AL.,)
Respondents.)

Pages: 1 through 106

Place: Washington, D.C.

Date: April 19, 2021

HERITAGE REPORTING CORPORATION

Official Reporters

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3 JANET L. YELLEN,)
4 SECRETARY OF THE TREASURY,)
5 Petitioner,)
6 v.) No. 20-543
7 CONFEDERATED TRIBES OF THE)
8 CHEHALIS RESERVATION, ET AL.,)
9 Respondents.)
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12 ASSOCIATION, INC., ET AL.,)
13 Petitioners,)
14 v.) No. 20-544
15 CONFEDERATED TRIBES OF THE)
16 CHEHALIS RESERVATION, ET AL.,)
17 Respondents.)
18 - - - - -
19 Washington, D.C.
20 Monday, April 19, 2021
21
22 The above-entitled matter came on for oral
23 argument before the Supreme Court of the United States
24 at 10:00 a.m.
25

1 APPEARANCES:

2

3 MATTHEW GUARNIERI, Assistant to the Solicitor General,
4 Department of Justice, Washington, D.C., for the
5 Petitioner in Case No. 20-543.

6 PAUL D. CLEMENT, ESQUIRE, Washington, D.C.; on behalf
7 of the Petitioners in Case No. 20-544.

8 JEFFREY S. RASMUSSEN, ESQUIRE, Louisville, Colorado;
9 on behalf of the Respondents.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 20-543, Yellen versus the Confederated Tribes, and the consolidated case.

Mr. Guarnieri.

ORAL ARGUMENT OF MATTHEW GUARNIERI
ON BEHALF OF THE PETITIONER IN CASE NO. 20-543

MR. GUARNIERI: Mr. Chief Justice, and may it please the Court:

Our fundamental submission in this case is that in defining "Indian Tribe" for ISDA purposes, Congress did not deliberately include Alaska native regional and village corporations only to then exclude all of them by subjecting them to a formal political recognition requirement that no ANC meets or, indeed, has ever met.

Instead, the settled understanding for the last 45 years has been that ANCs are eligible to be treated as Indian Tribes for ISDA purposes, even though ANCs are not and have never been federally recognized Indian Tribes. That interpretation has been endorsed by all

1 three branches of the federal government.

2 Congress was acting against the
3 backdrop of those settled understandings when it
4 incorporated the ISDA definition of "Indian
5 Tribe" into the CARES Act in 2020. Congress
6 chose to make ANCs eligible to receive millions
7 of dollars of coronavirus relief funds to
8 benefit the many Alaska natives whom they serve.

9 The decision below contravenes that
10 policy judgment and threatens to shut ANCs out
11 of a wide range of important federal programs.
12 No sound principle of textual interpretation
13 justifies such a dramatic departure from the
14 status quo. Reading the ISDA definition to mean
15 that ANCs are included only in the event that
16 they are someday somehow recognized by the
17 United States for government-to-government
18 relations would render their deliberate
19 inclusion in the statute a dead letter. Either
20 the recognition clause must mean something else,
21 or it does not apply to ANCs.

22 Now we principally urge the latter
23 approach, which the Department of the Interior
24 and the Indian Health Service adopted decades
25 ago and which the Ninth Circuit endorsed in the

1 Cook Inlet case.

2 In our view, Congress defined the
3 entities eligible to enter into ISDA agreements
4 as federally recognized Indian Tribes and also,
5 in addition, the entities that play a similar
6 role in the special case of Alaska, namely,
7 Alaska native villages and Alaska native
8 corporations defined in and established pursuant
9 to ANCSA. That reading, unlike Respondents'
10 reading, gives effect to every word and clause
11 in the statute.

12 I welcome the Court's questions.

13 CHIEF JUSTICE ROBERTS: Counsel, as I
14 think you confirmed in this opening statement,
15 you rely heavily on the legislative history, the
16 congressional purpose, the post-enactment
17 history, and there was a time when this Court
18 also relied on those sources, but this -- this
19 is not that time.

20 And what is the best case you can cite
21 from recent years for your -- your general
22 approach?

23 MR. GUARNIERI: Well, I think the case
24 that -- that we find the most instructive is the
25 Court's decision against -- in United States

1 against Hayes, which is the case discussed in
2 our opening brief. In Hayes, the Court was
3 considering a statutory definition of the term
4 "misdemeanor" -- "domestic misdemeanor violence"
5 -- or, sorry, "misdemeanor crime of domestic
6 violence," and the -- the statutory definition
7 there had a prefatory clause and then two
8 subsections, and the question before the Court
9 was how to apply a modifier in the second
10 subsection.

11 And based on textual and contextual
12 evidence, the Court concluded that the modifier
13 that appeared in the second subclause of that
14 definition actually applied to its -- its
15 antecedent was one of the words in the prefatory
16 clause at the beginning of the definition.

17 And we think we're asking the Court
18 here for -- for an even less sort of -- the
19 interpretation that we're urging here is even
20 more naturally sort of derived from the text
21 than the interpretation the Court adopted in
22 Hayes.

23 And also, you know, to your -- to your
24 point, Mr. Chief Justice, I mean, we are making
25 a textual argument. It's not entirely

1 purposive. And -- and it's a text -- it's a
2 textual argument derived from ISDA's definition,
3 as well as from the other statutes that Congress
4 has enacted that in their text presuppose that
5 ANCs are eligible to be treated as Indian
6 Tribes.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas.

10 JUSTICE THOMAS: Thank you, Mr. Chief
11 Justice.

12 Counsel, would you give us again --
13 would you repeat -- maybe I missed it -- your --
14 your textual argument again?

15 It seems like the -- there -- it seems
16 -- I don't know how you cannot have the -- the
17 -- the phrase or clause at the end modifying the
18 entire list.

19 MR. GUARNIERI: Well, Justice Thomas,
20 the -- the textual argument is that if -- if you
21 look at -- the definition of ISDA should not be
22 read to include ANCs in a -- in -- Congress did
23 not deliberately and specifically refer to
24 Alaska native village and regional corporations
25 established pursuant to a then-recent federal

1 law only to exclude them in the very next
2 clause. We don't think the statute should be
3 read to be at war with itself. And the --

4 JUSTICE THOMAS: Yeah, but what do you
5 do with the recognized language?

6 MR. GUARNIERI: Well, we think that
7 that clause, as the Interior Department
8 concluded in 1976 shortly after ISDA was
9 enacted, we think that clause is simply
10 inapplicable to the entities listed in the
11 Alaska clause and that that's really the -- the
12 only reading or the reading of the statute that
13 would avoid the glaring super -- super-fluidity
14 problem that the D.C. Circuit's reading created.

15 And, of course, as an -- as an
16 alternative, we have also advanced in this Court
17 the argument that, if you understand the
18 recognition clause to apply to the entities
19 listed in the Alaska clause, then recognition
20 cannot refer exclusively to formal federal
21 recognition for government-to-government
22 relations but must also include the lesser form
23 of recognition that Congress itself bestowed
24 upon ANCs by including them in the ISDA
25 definition.

1 JUSTICE THOMAS: In the subsequent
2 funding bills, has Congress, with this --
3 recognizing that there's been this litigation,
4 has Congress used different language?

5 MR. GUARNIERI: Congress has gone both
6 ways on that issue, Justice Thomas. I mean, in
7 -- in the law that Congress enacted, I -- I
8 assume your -- your question is about the recent
9 coronavirus legislation?

10 JUSTICE THOMAS: Exactly.

11 MR. GUARNIERI: Well, in -- in the law
12 that Congress enacted in December of 2020,
13 Congress provided funds for housing programs
14 under a preexisting federal statute that
15 incorporates, in part, the ISDA language. And
16 Congress included a proviso there saying that,
17 for -- for the avoidance of doubt, that
18 definition includes ANCs.

19 Now, in the most recent law, the
20 America Rescue Plan Act, Congress provided
21 additional funds, coronavirus relief funds to
22 state and local governments and to tribal
23 governments using the List Act definition, which
24 excludes ANCs. So Congress determined not to
25 include ANCs in that program.

1 And, of course, Congress could have
2 done that in the CARES Act. It could have
3 reached for the List Act definition, which
4 everyone understands does not include ANCs, but
5 Congress instead used the -- the ISDA
6 definition, which has been uniformly understood
7 for decades to make ANCs eligible.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: I -- I'm just curious
12 as to whether -- what CARES Act expenditures
13 necessary related to COVID, et cetera -- do the
14 Alaska corporations make that kind of
15 expenditure? Are there examples of where they
16 did or would normally or -- where it was
17 necessary, in other words, necessary as in the
18 CARES Act?

19 MR. GUARNIERI: Yes, Your Honor. I
20 think there's the amicus brief filed by Cook
21 Inlet Region Incorporated, which is the regional
22 ANC covering the Alaska area, goes into that in
23 some detail. I mean, ANCs provide social
24 services to their members, and -- and in -- in
25 the course of doing so, they -- they have and

1 can incur necessary expenditures in response to
2 the pandemic, things like the purchase of
3 personal protective equipment, modifying
4 facilities for safe social distancing.

5 JUSTICE BREYER: Okay. I -- I see
6 that. What's actually bothering me here is I
7 gather there are roughly 150 statutes that
8 definitionally refer to the -- the -- the
9 language -- refer to the statute at issue here,
10 the ISDA, that's the -- that's the statute,
11 right, that has the definition. Okay.

12 I don't know what's in that 150
13 statutes. I suspect that some of them it makes
14 sense to apply to the corporations, the Alaska
15 Indian -- the corporations, and some it doesn't.

16 So I have a very hard time -- have you
17 been through those? Do we know that the view
18 that the -- you're -- you're taking now is -- is
19 -- is going to work in all those 150 statutes?

20 MR. GUARNIERI: Well, Justice Breyer,
21 we -- we have reviewed those statutes.

22 JUSTICE BREYER: Yeah.

23 MR. GUARNIERI: And I -- I agree that
24 the ISDA definition is quite frequently -- it
25 quite frequently appears in the U.S. code,

1 either by cross-reference or -- or by Congress
2 having used the same language.

3 Now, as we discuss at pages 33 to 34
4 of our opening brief, there are statutes in
5 which there are other textual and contextual
6 clues that indicate that either ANCs are not
7 included for other reasons or ANCs -- that the
8 programs are sort of inapplicable to ANCs.

9 JUSTICE BREYER: Yeah.

10 MR. GUARNIERI: So I don't -- you
11 know, we -- we don't --

12 JUSTICE BREYER: How do you do that?
13 I mean, that's -- that's what I can't quite
14 figure out, because there's an argument, you
15 know, that even if the ISDA applies, the CARES
16 Act doesn't apply.

17 But I don't see -- once you say the
18 ISDA -- once that definition applies, and it's a
19 statute that really doesn't make sense to put
20 this kind of corporation in it, how do you read
21 them out of it?

22 MR. GUARNIERI: Well, I -- I think, in
23 general, it's a separate analysis for each
24 statute. I think, you know, one of the most
25 persuasive pieces of textual evidence -- and, of

1 course, there are -- there are instances in
2 which Congress has used the ISDA definition --

3 JUSTICE BREYER: Mm-hmm.

4 MR. GUARNIERI: -- and then has
5 expressly excluded the -- the native village --

6 JUSTICE BREYER: Yeah, yeah, yeah --

7 MR. GUARNIERI: -- and regional
8 corporations --

9 JUSTICE BREYER: -- I grant you that.

10 MR. GUARNIERI: -- that -- that --
11 that really only makes sense if Congress
12 understands the ISDA definition to include ANCs
13 as the provider --

14 JUSTICE BREYER: All right. So that's
15 -- that's -- now you got me where -- thank you.
16 That's really helpful.

17 CHIEF JUSTICE ROBERTS: Justice Alito.

18 JUSTICE ALITO: Mr. Guarnieri, I -- I
19 think you have an absurdity argument, and I'll
20 ask Respondents' counsel about that.

21 But, if you can't prevail on that
22 basis, I can see one textual argument that could
23 possibly work for you, and you make it only in
24 passing, and that is that the clause "which is
25 recognized as eligible" doesn't mean formal

1 recognition in the sense in which Indian Tribes
2 are recognized.

3 Do you have any other textual
4 argument?

5 MR. GUARNIERI: Well, yes, Justice
6 Alito. I mean, our -- our -- well, first, we
7 would accept a decision by that court on that
8 alternative ground, but, I mean, as to our
9 principal argument, I think the textual argument
10 is that the word "including" here functions as a
11 term of enlargement rather than to denote a
12 subset of -- of the specified entities --

13 JUSTICE ALITO: Yeah. No, I --

14 MR. GUARNIERI: -- as I think Justice
15 --

16 JUSTICE ALITO: -- I -- I understand
17 that point. I -- I think that's -- that's
18 possible. I don't see how it helps you, because
19 you still have a clause modifying a list, and
20 you want it to jump over the last item in the
21 list. That's really odd, isn't it?

22 MR. GUARNIERI: I -- I take the point.
23 Let -- let me try a plain English example to
24 illustrate how -- how we think the ISDA
25 definition works here.

1 I mean, suppose a state were to
2 prioritize for vaccinations all doctors, nurses,
3 and other healthcare workers, including their
4 spouses and minor children, whose jobs require
5 frequent contact with the public.

6 Now I think, in context, one would
7 naturally understand that the final clause in
8 that, the clause referring to jobs requiring
9 frequent -- frequent contact with the public,
10 really only modifies and in context can only be
11 understood to modify the doctors, nurses, and
12 other healthcare workers who appear in the list
13 at the beginning.

14 And then there's just an including
15 clause stuck in the middle there, in perhaps not
16 the most elegant place, but in a place that
17 makes clear that the intent is to expand that
18 category of, you know, front-line workers to
19 also include their families and minor children.

20 And that's what Congress did in the
21 ISDA definition. Congress -- so Congress in --
22 the -- the -- the definition is best read to
23 refer to federally recognized Indian Tribes and
24 then also including in addition the specific
25 Alaska native village and region -- regional

1 corporations that Congress singled out for
2 inclusion in an Alaska-specific clause.

3 JUSTICE ALITO: All right. Well,
4 that's very close to what I refer to as the
5 absurdity argument.

6 If we were to take the other possible
7 textual approach and say that "recognize"
8 doesn't mean formal recognition, what effect
9 would that have in other statutes that use this
10 same definition?

11 Would you be willing to accept that,
12 or do you want -- would you want us to say this
13 is what it means only in the CARES Act and not
14 in the other statutes in which the same
15 definition is used?

16 MR. GUARNIERI: Well, Justice Alito, I
17 -- I think our alternative argument is a little
18 -- slightly different. I mean, I think we would
19 say that "recognition" -- on the alternative
20 argument, "recognition" doesn't refer
21 exclusively to federal recognition for
22 government-to-government relations but can also
23 refer to the lesser status that Congress
24 conferred on ANCs.

25 And -- and there's a reason I would

1 emphasize that distinction, and -- and it's
2 that, you know, I mean, ISDA contracting is not
3 entirely discretionary, and so we do have some
4 concern that other organized groups of Indians
5 who are not federally recognized Indian Tribes
6 would be coming in and demanding that the
7 Interior Department engage in ISDA contracting
8 with them --

9 JUSTICE ALITO: All right. Thank you,
10 counsel. My time is up.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor.

13 JUSTICE SOTOMAYOR: Counsel, I -- I'm
14 a bit concerned, the way Justice Breyer is,
15 about what our ruling would mean here, and it's
16 consistent, in part, with what Justice Alito has
17 just asked you, which is how do we rule in a
18 narrow way that affects only the CARES Act and
19 not the many other acts that are involved where
20 ISDA mentioned the Johnson-O'Malley Act, the
21 Snyder Act, which I think is now the Indian
22 Health Improvement Act, and the Transfer Act?

23 But I'm also understanding, I believe
24 -- and you can confirm or disaffirm -- that
25 there are many other housing assistance,

1 healthcare, and social service to thousands of
2 Alaska natives each year by the ANCs.

3 Would our -- if we were to accept
4 Respondents' position and the D.C. Circuit's
5 holding below that ISDA does not -- cannot
6 include anyone but federally recognized tribes,
7 would we be putting at risk all of those other
8 services?

9 MR. GUARNIERI: Well, yes, Justice --

10 JUSTICE SOTOMAYOR: And, if so, is the
11 federal government prepared to step in and
12 provide those services?

13 MR. GUARNIERI: Well, I -- I -- that
14 -- that's exactly right, Justice Sotomayor. A
15 decision affirming the D.C. Circuit here and
16 adopting Respondents' construction would call
17 into question the treatment of ANCs under
18 numerous other federal laws that currently
19 provide important federal benefits to Alaska
20 natives, including housing assistance and energy
21 assistance.

22 And, you know, to -- to your broader
23 point, Justice Sotomayor, I mean, the -- the --
24 the interpretation that we are propounding here
25 is the interpretation that has prevailed for 45

1 years and that was the backdrop for Congress's
2 enactment of numerous other programs
3 incorporating the ISDA language. And so a
4 decision in Respondents' favor would threaten to
5 really --

6 JUSTICE SOTOMAYOR: Okay.

7 MR. GUARNIERI: -- seriously disrupt
8 the intent of the clause.

9 JUSTICE SOTOMAYOR: So, counsel, give
10 us the narrowest ruling that would let
11 Respondents win and not put those contracts at
12 risk.

13 MR. GUARNIERI: Well, of course,
14 Justice Sotomayor, we -- we think that
15 Respondents should not win. I mean, we're here
16 principally defending that --

17 JUSTICE SOTOMAYOR: I -- I -- I -- I
18 respect that, counsel. I'm asking you to tell
19 me --

20 MR. GUARNIERI: Sure, sure. I -- I --
21 I take the point. Well, as between the -- the
22 arguments offered on the other side, a decision
23 finding that ANCs are excluded from receiving
24 CARES Act funds by some specific language in the
25 CARES Act, for example, the definition of a

1 tribal government in the CARES Act, would mean
2 that ANCs are ineligible to receive these
3 particular CARES Act funds but would not
4 necessarily call into their -- question their
5 eligibility to be treated as Indian Tribes for
6 ISDA purposes under the broader corpus of Indian
7 laws. So, certainly, a CARES Act-specific
8 decision would be a much more narrower ground.

9 The D.C. Circuit here really decided
10 the case on the broadest possible ground. I
11 mean, in the CARES Act dispute, the D.C. Circuit
12 concluded that ANCs have never been eligible to
13 be treated as Indian Tribes for ISDA purposes,
14 despite decades of practice to the contrary.

15 CHIEF JUSTICE ROBERTS: Justice Kagan.

16 JUSTICE KAGAN: Mr. Guarnieri, would
17 it be fair to say that your textual argument
18 really isn't a textual argument; it's an
19 argument that Congress just made a mistake?

20 MR. GUARNIERI: I -- Justice Kagan,
21 I'm not -- I'm not going to sit here and say
22 that this is the best possible way to draft a
23 statute of all of the possible --

24 JUSTICE KAGAN: Well, I think we can
25 --

1 MR. GUARNIERI: -- ways to draft a
2 statute --

3 JUSTICE KAGAN: -- all agree on that.
4 I mean, the question is -- I mean, you're
5 saying, look, they -- they wouldn't have put
6 something in just to put some -- take something
7 out. I understand that.

8 But there's just no grammatical way to
9 read this statute the way you want to read it,
10 no grammatical way, which isn't to say that
11 that's not what Congress intended. I mean, I
12 would have thought that what you're really
13 saying is Congress made a bad grammatical error,
14 but we know what they meant.

15 MR. GUARNIERI: I -- I -- I think
16 that's a fair characterization, Justice Kagan.
17 I mean, in Hayes, the decision that I referred
18 to earlier in my colloquy with the Chief
19 Justice, the Court described the statute as less
20 than meticulously drafted, and I think we're --
21 we're probably in that category here.

22 But, as you said, I mean, I think it's
23 very clear what the meaning of this statute was,
24 and that's why --

25 JUSTICE KAGAN: But then -- then the

1 question becomes, is it? You know, because I
2 think it's a high bar before we're so confident
3 that Congress made a mistake that we just say we
4 think Congress made a mistake, but they meant
5 something else.

6 MR. GUARNIERI: Right.

7 JUSTICE KAGAN: And -- and that comes
8 to this question of could they have meant what
9 they appear to mean if you just look at the
10 text, which is that they included the ANCs so
11 that if those ANCs were recognized in the
12 future, they would qualify?

13 MR. GUARNIERI: Well, there's just
14 absolutely no hint in -- in the history of ISDA
15 that -- that Congress understood ANCs to be
16 included only on the condition that Congress
17 itself, in the future, were to somehow decide to
18 recognize for government-to-government relations
19 these recently established and privately owned
20 corporations.

21 We just don't think that that's a --
22 it's a -- a contextually implausible
23 result that --

24 JUSTICE KAGAN: But wasn't there,
25 Mr. Guarnieri, some uncertainty at the time

1 about what kinds of Alaskan groups would be
2 recognized? I mean, we often say that Alaska is
3 different. And that seems to be the case here,
4 that the government had recognized native groups
5 without traditional historic bonds. ANCs would
6 have resembled tribes in that they owned land.
7 I mean, we just have sort of different groups
8 here, and why might Congress not have thought,
9 well, we'll see how it all plays out and maybe
10 one day, given the -- the circumstances of
11 Alaska, these groups will be recognized?

12 MR. GUARNIERI: Justice Kagan, the --
13 the principal consideration going the other way
14 is that for 180 years, one of the core elements
15 of the United States' Indian law has -- has been
16 the idea that Indian Tribes are possessed of an
17 inherent sovereignty, a sovereignty that is not
18 conferred on them by federal or state law.

19 And that is simply not true for ANCs,
20 and it has never been true, and it would have
21 been apparent to the Congress at the time it
22 enacted ISDA that it was not true. ANCs were
23 established pursuant to a special federal law.
24 They are incorporated under state law. And they
25 are not sovereign entities. And -- and that was

1 evident to everyone at the time.

2 JUSTICE KAGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

5 JUSTICE GORSUCH: Good morning,
6 counsel. Putting aside what -- what has been
7 called the absurdity argument and just focusing
8 on the -- the last clause of the text, the
9 recognition clause, and assuming that that means
10 something and applies to ANCs, the D.C. Circuit
11 suggested that that's a settled term of art and
12 it refers to government-to-government relations.

13 What -- what's your response to that
14 argument?

15 MR. GUARNIERI: Well, I -- you know,
16 in -- in the lower courts, we also advocated
17 that the recognition clause should be understood
18 to refer to recognition in the formal
19 term-of-art sense, and that's an important
20 premise for our -- our main argument, which is
21 that the clause, as a matter of context, really
22 cannot be read to include the ANCs.

23 Now, in this Court, we have also --

24 JUSTICE GORSUCH: So am I right in
25 understanding that -- that -- you know, that --

1 that -- that -- that you -- you think it is a
2 term of art and that it does refer to
3 government-to-government relations?

4 MR. GUARNIERI: Yes, Justice --
5 certainly, language like that has come to be
6 understood as a term of art. It's less clear to
7 us that that would have been apparent to
8 Congress in 1975 when it enacted ISDA.

9 I mean, the precise language at issue
10 here, "recognized as eligible," that phrase was
11 not common. It had appeared in perhaps a
12 handful of statutes prior to ISDA, but there was
13 no sort of longstanding -- no --

14 JUSTICE GORSUCH: You've got no --
15 you've got no better -- no better solution than
16 to -- than to agree that it's a formal term of
17 art referring to government-to-government
18 relations?

19 MR. GUARNIERI: Well, that's the way
20 that the executive branch has understood it
21 for -- in practice for the last several decades,
22 and -- and --

23 JUSTICE GORSUCH: Okay.

24 MR. GUARNIERI: -- we have also
25 understood it not to apply to ANCs. That's the

1 settled construction, and it was the settled
2 construction when Congress incorporated that --
3 the meaning of ISDA into the CARES Act in 2020.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh.

7 JUSTICE KAVANAUGH: Thank you, Chief
8 Justice.

9 Good morning, Mr. Guarneri. I just
10 want to follow up on Justice Gorsuch's questions
11 there. I read your alternative argument in the
12 brief that -- to say that you agree with the
13 other Petitioner that we shouldn't read it as a
14 term of art. So I'm a little confused about
15 what your argument is.

16 MR. GUARNIERI: Well, Justice
17 Kavanaugh, it's -- it's an argument in the
18 alternative. I mean, our -- our principal
19 argument is that the recognition clause refers
20 to recognition as a term of -- as a term of art
21 for formal -- the establishment and
22 institutionalization of formal
23 government-to-government relations, and -- and
24 that's why it cannot be read to apply to the
25 ANCs, because there's simply no sound basis to

1 think that Congress had in mind that ANCs would
2 be included only in the event that they were
3 somehow in the future recognized for
4 government-to-government relations.

5 Now, in the alternative, if the -- if
6 the Court disagrees with us on that point, then
7 we would -- then we would argue that a -- that a
8 reasonable and certainly a reading that is
9 available to the Court is that the recognition
10 clause applies to the ANCs but that it doesn't
11 refer exclusively to recognition in that
12 term-of-art sense.

13 Both of those constructions would be
14 far better than the D.C. Circuit's
15 constructions, which render the Alaska-specific
16 -- render the deliberate inclusion of ANCs just
17 a dead letter in the statute.

18 JUSTICE KAVANAUGH: To pick up on
19 questions I think Justice Breyer, Justice Alito,
20 and Justice Sotomayor were asking about the
21 implications for other statutes, we have a
22 number of amicus briefs saying -- for example,
23 the brief for the Senators and Congressmen
24 saying the potential ramifications would be
25 staggering if your position would not prevail.

1 The Cook Inlet one says -- says it would
2 destabilize the entire tribal health and social
3 services system in Alaska. The brief of the
4 Alaska Federation of Natives says similar
5 things.

6 Do you agree with that, or is there --
7 or not?

8 MR. GUARNIERI: We do -- we do agree
9 with that. We have grave concerns about what
10 the effects of affirming the D.C. Circuit's
11 decision here would be on a wide range of other
12 federal programs.

13 Now, as -- as -- as a -- as a matter
14 of practice, there are relatively few ISDA
15 agreements currently in force, other than the
16 ISDA agreement that the Cook Inlet Region
17 Incorporated, the ANC for the Anchorage area,
18 has to deliver federally funded healthcare
19 services to Alaska natives in -- in Anchorage.

20 And, you know, with respect to that
21 specific ISDA agreement, Congress enacted a
22 statute that provides -- arguably provides a
23 statutory basis for that separate and apart from
24 ISDA.

25 So we're not -- we're not entirely

1 sure what the effect of a decision would be on
2 CIRI's arrangements, but, certainly, we are
3 gravely concerned about, you know, the
4 destabilizing effect of disrupting what has been
5 the status quo for a very long time.

6 JUSTICE KAVANAUGH: One last question.
7 How much money is exactly at stake and what will
8 happen to it if you lose?

9 MR. GUARNIERI: Initially, the
10 Department of Treasury allocated about 6 percent
11 of this 8 billion dollar fund to the ANCs, which
12 is about \$530 million. But, as a result of
13 separate litigation, there are proceedings
14 ongoing in district court in DDC right now.

15 As the result of those proceedings,
16 Treasury is currently in the process of
17 reconsidering the methodology it used to
18 distribute at least a portion of these funds,
19 and that -- that could impact the amount of
20 funds available to go to the ANCs.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett.

24 JUSTICE BARRETT: Good morning, Mr.
25 Guarnieri. I want to go back to the eligibility

1 clause.

2 So you -- you told several of my
3 colleagues that the recognition clause -- that
4 one way to understand it is that it's a term of
5 art but that it has a -- well, that you could
6 take its ordinary meaning, simply, you know, an
7 entity that contracts with the federal
8 government for services that are designed to go
9 to Indians because of their status as Indians.

10 And you said, well, sure, you can look
11 at this, and I understand it's your backup
12 argument, but you can understand it in its
13 ordinary meaning as the other Petitioner
14 advocates for.

15 Now you say but a lesser-included
16 definition would be the term-of-art recognition
17 definition like we see in the later-passed List
18 Act.

19 I don't really see how you can have a
20 -- a lesser included specialized definition. It
21 seems to me either it's ordinary meaning or it's
22 not. And, you know, you're kind of cagey in
23 your brief and I think a little bit at oral
24 argument too about whether, in fact, that
25 eligibility clause refers to FRT status.

1 So which is it? I mean, is this the
2 first time that the government has taken the
3 position that language like this doesn't refer
4 to FRT status?

5 MR. GUARNIERI: I -- I guess I would
6 -- I would put the point this way. I mean, we
7 think that that clause can be reasonably read to
8 refer to having a requisite status under federal
9 law, and then it just applies -- you know,
10 different entities would be able to satisfy that
11 requirement in different ways.

12 For the ANCs, Congress deemed them to
13 satisfy it by specifically including them among
14 the entities that are eligible to enter into
15 ISDA agreements.

16 For the generic terms listed at the
17 beginning of this statute, that is, any Indian
18 Tribe, band, nation, or other organized group or
19 community, I mean, the established way for those
20 -- those groups to demonstrate that they have
21 the requisite status is to be acknowledged for
22 government-to-government relations with the
23 United States.

24 JUSTICE BARRETT: But -- but let me
25 just ask you. That sounds like you're folding

1 back into your argument about, well, specific
2 mention of the Alaskan entities would have not
3 made any sense if the eligibility clause was
4 designed to apply to them because ANCs by their
5 very composition have -- you know, they were
6 designed to channel money from the federal
7 government to their shareholders, and so they
8 had that status from the beginning.

9 So what I'm asking you is a little bit
10 different because, if the ordinary meaning, say,
11 of that eligibility clause prevails, then we
12 don't have to -- we could rule in your favor
13 without doing this kind of fancy footwork around
14 the awkward grammatical reading of the statute.

15 MR. GUARNIERI: Well --

16 JUSTICE BARRETT: But you don't really
17 seem to be endorsing that.

18 MR. GUARNIERI: Well, I -- I -- I --
19 we would -- we would entirely accept a decision
20 on those grounds, and I -- I don't mean to be
21 dancing around it. Our -- our -- our -- our
22 concern is that, in general, we -- we would hope
23 to preserve the ability to ensure that ISDA
24 agreements are -- are entered into with tribes
25 or federally recognized tribes that have a kind

1 of recognized status under federal law and not
2 simply groups of self-identified Indians who
3 come to the Interior Department and demand to
4 take over the delivery of federally funded
5 services.

6 That's why it's important to us as a
7 programmatic matter that, in general, the way
8 that Indian Tribes demonstrate that they have
9 the requisite status is through the
10 acknowledgment process, through the process of
11 --

12 CHIEF JUSTICE ROBERTS: A minute to
13 wrap up, counsel.

14 MR. GUARNIERI: Thank you, Mr. Chief
15 Justice.

16 I would just like to emphasize again a
17 couple of the points that I touched on this
18 morning.

19 First, ISDA's definition of "Indian
20 Tribes" should not be read to be at war with
21 itself. Congress did not deliberately and
22 specifically include ANCs in one clause only to
23 then exclude them in the very next clause.

24 Now our principal argument is that
25 that if "recognition" is understood as a term of

1 art, then the clause should not apply to ANCs,
2 but we would accept a decision under which
3 "recognition" is given a somewhat more capacious
4 meaning, and -- and the ANCs satisfy that.

5 Second, I just want to emphasize again
6 that the question presented here arises under
7 the CARES Act, which Congress enacted in 2020,
8 and by that time, there can be no real question
9 that the ISDA definition was uniformly
10 understood to include ANCs, even though they are
11 not federally recognized Indian Tribes.

12 That was the administrative
13 construction, it was the Ninth Circuit's
14 construction in the Cook Inlet case, the
15 construction articulated in all of the leading
16 treatises in this area. That's the meaning
17 Congress incorporated, and that's the meaning we
18 ask this Court to endorse.

19 Thank you, Mr. Chief Justice.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Clement.

23 ORAL ARGUMENT OF PAUL D. CLEMENT ON
24 BEHALF OF THE PETITIONERS IN CASE NO. 20-544

25 MR. CLEMENT: Mr. Chief Justice, and

1 may it please the Court:

2 Nearly everything about Alaska is
3 different, including its native entities.
4 Congress established ANCs in the Settlement Act
5 as native entities unlike lower 48 tribes. ANCs
6 have never been sovereign, but they have always
7 played a critical role in distributing special
8 federal Indian benefits to Alaska natives.

9 Congress specifically added ANCs to
10 ISDEAA's definition of "Indian Tribes."
11 Respondents, however, contend that Congress
12 accomplished nothing because ANCs do not satisfy
13 the eligibility clause.

14 But, if that clause is only given its
15 ordinary meaning, ANCs plainly satisfy it.
16 Congress said "recognized as eligible," not
17 "recognized as sovereigns," and ANCs have long
18 been recognized as eligible for special federal
19 Indian benefits starting with the Settlement
20 Act.

21 If, instead, the phrase is given a
22 term-of-art meaning restricted to sovereign
23 tribes, then it is wholly inapplicable to
24 entities established by Congress as alternatives
25 to sovereign tribes.

1 Either reading is vastly preferable to
2 one that would defeat the ANCs' specific
3 inclusion in the definition.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 In your brief, you compare this
7 statute to the case of a caretaker being told to
8 feed the cats, the dogs, and goldfish, which are
9 barking, and -- but the force of that analogy
10 comes from the fact that it's impossible for the
11 goldfish to bark.

12 In this case, though, Congress has the
13 authority, right, to formally recognize the
14 ANCs? And so doesn't that undermine your
15 analogy?

16 MR. CLEMENT: I -- I don't think so,
17 Your Honor, because you're right to say that
18 Congress could, in a subsequent act, recognize
19 the ANCs, but that would be a complete departure
20 both from the nature of ANCs and the nature of
21 sovereign recognition.

22 CHIEF JUSTICE ROBERTS: But you do --

23 MR. CLEMENT: And, of course --

24 CHIEF JUSTICE ROBERTS: -- you do
25 agree that they have that authority, Congress

1 has the authority to recognize them? In other
2 words, this goldfish -- this goldfish can bark?

3 MR. CLEMENT: Well, only if --
4 essentially, if Congress passed the statute that
5 says that, when goldfish move their lips, we are
6 going to construe that to be barking, which is
7 to say, you know, it really is impossible based
8 on any understanding of the nature of either
9 ANCs or sovereign recognition to say that the
10 ANCs would be recognized as tribes.

11 CHIEF JUSTICE ROBERTS: If I end up --

12 MR. CLEMENT: And so --

13 CHIEF JUSTICE ROBERTS: -- if I end up
14 where Judge Henderson did and say that the
15 purpose is clear, but the text is also clear,
16 how do I come out the other way? How do you
17 resolve that conflict?

18 MR. CLEMENT: Well, I -- I think the
19 way to resolve that conflict -- the easiest way
20 is to give the -- the eligibility clause its
21 ordinary meaning. It says "recognized as
22 eligible." It doesn't say "recognized as
23 sovereign."

24 Now those may be the same thing in the
25 lower 48, but they're very different in Alaska

1 because of the Settlement Act. And so I think
2 that's the way you give meaning to every word in
3 the statute and also honor Congress's evident
4 intent both in 1975 and in 2020.

5 CHIEF JUSTICE ROBERTS: Justice
6 Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief
8 Justice.

9 Mr. Clement, just some clarification.
10 Did the -- what's the overlap between the ANCs
11 and the 200-plus tribes in -- in Alaska?

12 MR. CLEMENT: Well, I guess one way to
13 answer that, Justice Thomas, is there -- I mean,
14 there -- so there's an overlap between the
15 village-level ANCs and the villages, but where
16 there is not an overlap is between the
17 membership and the shareholders of the regional
18 ANCs and the villages.

19 And if you look at just the Anchorage
20 area alone, you're talking about 54,000 Alaska
21 natives who get benefits from CIRI who are not a
22 member of one of the Anchorage area villages,
23 which aren't actually in Anchorage. They're
24 just in the surrounding region.

25 JUSTICE THOMAS: All right. So are

1 most of the -- are the shareholders of the
2 corporations, the ANCs, are they also members of
3 tribes too? Or are there non-tribal members who
4 are -- non-tribal individuals who are
5 shareholders?

6 MR. CLEMENT: There are many, many,
7 you know, tens of thousands, Alaska natives who
8 are shareholders of an ANC but not enrolled
9 members of any village-type tribe. So there's a
10 substantial number of that.

11 Of course, there is some overlap, but,
12 once you find that both entities are eligible,
13 there are various ways that it's relatively easy
14 to avoid double-counting.

15 JUSTICE THOMAS: And how would -- how
16 would you do that?

17 MR. CLEMENT: You would just make
18 adjustments for overlapping membership. You can
19 also -- for some formulas, you use things
20 different -- other than population. So there's
21 a variety of ways that -- that -- that the
22 Treasury Department actually did it in this very
23 distribution of funds.

24 And, more generally, the federal
25 government has found a way to make this work

1 because what you really do is you do have
2 identifiable native populations not just in
3 Anchorage but in Fairbanks, in Seward, and
4 Valdez who are not served by any village but are
5 served by the regional ANC, and those Alaska
6 natives will go radically underserved if the
7 ANCs are cut out of the statute.

8 JUSTICE THOMAS: What do you make of
9 the fact that, at least as I understand it,
10 there were no changes made to address the
11 confusion that we have or the controversy we
12 have in -- in this case in the American Rescue
13 Plan Act?

14 MR. CLEMENT: Well, I -- I think,
15 Justice Thomas, what's going on there is that --
16 that, you know, essentially, Congress didn't
17 want to prefigure how this Court would decide
18 this case. So, when Congress wanted to include
19 the federally recognized tribes only, it used
20 the List Act definition, and when it wanted to
21 include the ANCs, it specified that they were
22 included.

23 But I would say that the understanding
24 from 1975 through the reenactment in 1988 was
25 that the gold standard for including ANCs in a

1 statute was to use the ISDEAA definition.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: With your other
6 argument, you said, well, they're eligible,
7 they're eligible. In mine, that would get us
8 out of this problem, but I'm worried about the
9 other 150 statutes. Have you looked at those?
10 Do you know just your definition -- that kind of
11 definition wouldn't cause a problem somewhere
12 else?

13 MR. CLEMENT: I have looked at those
14 definitions, Justice Breyer, and I don't think
15 it would create a problem in those other
16 statutes, and I guess what I would say is I
17 think the situation is asymmetrical.

18 If -- there -- there are a couple of
19 statutes, and Respondents point to them, that
20 seem to include the ANCs in the statute that is
21 otherwise addressed to some sovereign function
22 that the ANCs really don't discharge, and that
23 modest degree of overinclusion is really
24 harmless error because they just don't
25 participate in the program.

1 Conversely, there are plenty of
2 statutes that embody the ISDA definition and are
3 -- plainly involve ANCs and have since their
4 inception. And as the federal government points
5 out in its brief, just in fiscal year 2020
6 alone, the ANCs received \$40 million in housing
7 assistance pursuant to NAHASDA, which basically
8 incorporates the definition from ISDEAA.

9 So I think the impact on other
10 statutes is completely asymmetrical. If the
11 ANCs fall out because they don't provide a
12 particular program, no harm, no foul.

13 If, instead, they're cut out of
14 programs they participated in for decades, there
15 are going to be tens of thousands of Alaska
16 natives who don't get benefits that Congress
17 plainly intended that they would receive not
18 just in the abstract but through ANC.

19 JUSTICE BREYER: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Alito.

21 JUSTICE ALITO: Is there a difference
22 between your interpretation of the recognition
23 clause and the Solicitor General's
24 interpretation? And if there is a difference,
25 what do you understand it to be?

1 MR. CLEMENT: I don't think there is a
2 difference, Justice Alito. I think, as you can
3 see from this morning's argument, though, that
4 probably the principal difference is I want to
5 leap to the ordinary language argument, and my
6 friend from the government seems to only want to
7 get -- sort of edge there.

8 But, you know, I don't think the other
9 side can really have it both ways. You're
10 either a textualist or you're not. And if
11 you're a textualist, why wouldn't you apply the
12 plain meaning of "recognized as eligible"?

13 Congress said "recognized as
14 eligible," not "recognized as sovereign." Those
15 may be interchangeable in the lower 48, but
16 they're very different terms in Alaska. And
17 that all goes back to the Settlement Act.
18 Congress didn't want to replicate the lower 48
19 of sovereign tribes more to reservations when
20 they distributed the benefits of the land
21 settlement, so they created these new entities
22 that were distinctly native entities that caused
23 every Alaska native to enroll in one of the
24 regional ANCs. They didn't require them to
25 enroll in a village.

1 And then, four years later, Congress
2 said, in a process of furthering
3 self-determination, we want to include the ANCs.
4 It would be bizarre to cut them out on the
5 understanding that what Congress really wanted
6 is not to have ANCs play a role in
7 self-determination but only allow sovereign
8 entities to play a role in self-determination
9 when Congress just rejected that judgment in
10 Alaska.

11 JUSTICE ALITO: Let me -- I'd like you
12 to see if I'm correct on these two points. The
13 CARE Act provided a one-time distribution of
14 funds, and at the time when the CARE Act was
15 enacted, no ANC had been recognized?

16 MR. CLEMENT: Recognized as sovereign.
17 I would say --

18 JUSTICE ALITO: Had been recognized as
19 --

20 MR. CLEMENT: -- they had been
21 recognized --

22 JUSTICE ALITO: None had been
23 recognized --

24 MR. CLEMENT: -- as eligible for
25 special federal Indian benefits.

1 JUSTICE ALITO: -- none had been
2 recognized in the sense that the D.C. Circuit
3 thought was necessary. Are those two points
4 correct?

5 MR. CLEMENT: Those two points are
6 crystal clear.

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor.

10 JUSTICE SOTOMAYOR: I -- I'm -- I'm a
11 bit confused, Mr. Clement. What do you see
12 "recognized as eligible" to mean?

13 MR. CLEMENT: So I -- I see
14 "recognized as eligible" to mean recognized by
15 the federal government as eligible to
16 participate in special federal Indian programs.

17 JUSTICE SOTOMAYOR: Okay.

18 MR. CLEMENT: And, like you said, in
19 the lower 48, recognition and sovereignty go
20 together. But, in Alaska in particular, they
21 sort of split that atom and they created these
22 entities, the ANCs, that are eligible to
23 participate in special federal Indian programs,
24 but they were never understood to be sovereign.

25 And so I think, if you recognize that

1 Alaska is different in this regard, then I think
2 that really solves the problem here. And as you
3 yourself pointed out, Your Honor --

4 JUSTICE SOTOMAYOR: No, I -- I -- I --
5 I don't disagree with you. I think that it
6 would make no sense to think that ISDA was based
7 on political recognition.

8 But let's get to the CARES Act, okay?
9 How would I see that as relevant to saying that
10 you were recognized to receive money that was
11 being given to governments when ANC are not
12 governments?

13 MR. CLEMENT: Oh, I think that's
14 relatively straightforward, Your Honor, because,
15 yes, the money is being given to tribal
16 governments, but tribal governments is just the
17 recognized governing body of a tribe as defined
18 in ISDEAA. And since ANCs are ISDEAA tribes and
19 they clearly have recognized governing bodies,
20 there really isn't any statutory problem there.

21 And if it helps, I would point you to
22 two other statutes, 40 U.S.C. 502(c)(3), 44
23 U.S.C. 3601(8), which are statutes that have a
24 statutory term of "tribal government" and
25 expressly include ANCs in the definition of

1 "tribal government." Somewhat ironically, they
2 include ANCs but not the villages in a
3 definition that is specifically directed to
4 tribal governments. So the CARES Act would not
5 be alone in including ANCs in a definition of
6 "tribal governments."

7 CHIEF JUSTICE ROBERTS: Justice --

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 CHIEF JUSTICE ROBERTS: -- Kagan.

11 Justice Kagan.

12 JUSTICE KAGAN: Mr. Clement, taking
13 this "recognized as eligible" meaning, when did
14 ANCs become recognized as eligible?

15 MR. CLEMENT: So, Justice Kagan, I
16 think ANCs became recognized as eligible in 1971
17 in the Settlement Act because, if you understand
18 that the Settlement Act is distributing the
19 benefits from an aboriginal land settlement, the
20 traditional thing you would do in that
21 circumstance in the lower 48 is you would give
22 the proceeds to a tribe.

23 But Congress in 1971 understood that
24 Alaska didn't have tribes and reservations the
25 way they did in the lower 48, so they

1 specifically created these entities, the ANCs,
2 to receive the proceeds of the settlement, which
3 I would understand to be special federal Indian
4 benefits, and importantly --

5 JUSTICE KAGAN: Right. But, I mean,
6 Mr. Clement, I mean, for sure, that Act settled
7 land claims, but what does the settling of land
8 claims have to do with eligibility for benefits
9 writ large?

10 MR. CLEMENT: So two things, Your
11 Honor.

12 First of all, they were aboriginal
13 land claims, so right there you know these are
14 distinct native entities to receive distinctly
15 native benefits.

16 But then the second point I would make
17 -- and I think this is important to understand
18 -- is Alaska natives were eligible in general
19 for special federal Indian benefits even before
20 the Settlement Act through the Snyder Act.

21 And the Snyder Act is one of the acts
22 that is empowered for self-determination under
23 ISDEAA. So, in a sense, this all works
24 perfectly together. Having just created
25 distinct native entities that every Alaska

1 native was a member of one of the regional ANCs,
2 then Congress in 1975 includes those entities in
3 a statute that's all about self-determination
4 with respect to funds that Alaska natives had
5 already all along, even before 1971, been
6 eligible for.

7 JUSTICE KAGAN: Thank you, Mr.
8 Clement.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch.

11 JUSTICE GORSUCH: Good morning, Mr.
12 Clement. It seems to me that the government is
13 a little nervous about moving off of recognition
14 in its formal sense because it's concerned about
15 self-identifying groups declaring their
16 eligibility for a lot of federal programs.

17 And you're a little less concerned
18 about that, understandably, but there are a
19 couple of -- a couple of terms there that just
20 I -- I struggle with.

21 To the extent we're defining a tribal
22 government for the CARES Act, isn't that an odd
23 fit for a corporate board?

24 MR. CLEMENT: Again, Justice Gorsuch,
25 I don't think that it is. And, you know,

1 various Indian Tribes -- and you probably know
2 this better than I do -- are organized in
3 various different ways. I'm sure there are
4 lower 48 tribes that have some kind of corporate
5 -- incorporation and some kind of board.

6 So it's not like you can't have a
7 native entity that is governed by a board of
8 directors, which is a very common, ordinary way
9 of referring to it. And as I alluded to in
10 answering Justice Sotomayor's questions, there's
11 at least two other statutes that specifically
12 include ANCs --

13 JUSTICE GORSUCH: Are -- are --

14 MR. CLEMENT: -- in the definition of
15 --

16 JUSTICE GORSUCH: -- are -- are you
17 aware of other tribal governments organized in
18 this fashion in the lower 48?

19 MR. CLEMENT: I -- I can't point you
20 to one in specific. But I -- I -- I -- I
21 understood --

22 JUSTICE GORSUCH: What -- what -- what
23 about the separate phrase, "to Indians because
24 of their status as Indians"? Again, that seems
25 like an odd fit for the ANCs given that, of

1 course, you could be a member of the corporation
2 without being a native today, a lot of
3 alienation has occurred and is permissible.

4 MR. CLEMENT: Well, two things, Your
5 Honor. There hasn't been that much alienation,
6 and anybody who's not a native doesn't get a
7 voting share. They just get a share.

8 But, with that minor clarification,
9 obviously, that sort of "special federal Indian
10 benefits for Indians" is -- is -- is a bit of an
11 odd phrase not just, I think, as to ANCs but to
12 any group because it really seems to be talking
13 about the benefits that the Alaska natives or
14 the lower 48 natives themselves are eligible
15 because of their status as Indian.

16 But, to the extent entities have a
17 status, nobody doubts that ANCs have a native
18 status, and I think the fact that the real point
19 of the Self-Determination Act is to take natives
20 who are eligible for special federal Indian
21 benefits and instead of having the federal
22 government provide those directly, you have a
23 tribal entity do that.

24 And in Alaska, the ANCs have been
25 doing that for 45 years, and it's been working

1 exceptionally well. So there's no basis to
2 disturb that.

3 JUSTICE GORSUCH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh.

6 JUSTICE KAVANAUGH: Thank you, Chief
7 Justice.

8 Good morning, Mr. Clement. I just
9 want to explore briefly your understanding of
10 the term-of-art canon.

11 Is it your understanding, I think,
12 from what you're saying that the canon is
13 something of an exception to ordinary meaning?
14 In other words, sometimes you'll look at a
15 phrase or words and say the ordinary meaning is
16 X, but the term of art that we know is -- is Y?
17 Is that your understanding of how it works?

18 MR. CLEMENT: That is my
19 understanding, Justice Kavanaugh. And I do
20 think, as your question suggests, that the
21 strong preference is for ordinary meaning, which
22 is the rule, and term of art is the exception.

23 And in a situation like this, where
24 adopting the term-of-art reading would create a
25 real problem with the statute, that seems like

1 an obvious case to prefer the ordinary meaning.

2 JUSTICE KAVANAUGH: And what's your
3 best argument for why "recognized as eligible"
4 as ordinary meaning supports your position?

5 MR. CLEMENT: Well, I think it's a
6 pretty straightforward argument, Your Honor. I
7 mean, eligibility is not the same as
8 sovereignty. If Congress wanted everything to
9 turn on sovereignty, it would have said
10 "recognized as sovereign" or it might have even
11 said "eligible via recognition." But it didn't
12 use any of those terms.

13 And one other point I'd like to
14 emphasize is that the term-of-art argument is
15 much weaker in 1975 than it was in -- after the
16 List Act in 1994. In 1975, as the government's
17 lawyer suggested, "recognition" is not the
18 well-established term of art that it is. In
19 fact, in 1975, the federal government's
20 recognition process was kind of a mess.

21 And when they tried to regularize it a
22 little bit in 1978 with their first regulations,
23 even those regulations talked about
24 acknowledgment. And even today, the -- the
25 federal government has an Office of Tribal

1 Acknowledgment, not an office of tribal
2 recognition. It's really not until 1994 in the
3 List Act that you can really see "recognized as
4 eligible" as being a term of art, and even then,
5 it's really only a term of art for the lower 48.

6 So making it a low -- a term of art
7 back in 1975 that applies to Alaska that would
8 have the effect of frustrating the inclusion of
9 the Alaska clause really doesn't make any sense.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.

13 JUSTICE BARRETT: Mr. Clement, why
14 wouldn't it make sense? I mean, as you just
15 pointed out, the List Act uses language that's
16 identical to the eligibility clause in ISDA, so
17 why then aren't ANCs really practically
18 automatically recognized under the List Act?

19 MR. CLEMENT: Well, they're not, Your
20 Honor, because, if you go into the details of
21 the List Act and you go and look at the note to
22 the definition, it's very clear that what
23 Congress was trying to do in the List Act was to
24 essentially force the Interior Department to
25 formalize its process for sovereign recognition.

1 And the ANCs, just based on any
2 traditional criteria for sovereign recognition,
3 just don't -- don't come within the terms of
4 that List Act process. I wonder what --

5 JUSTICE BARRETT: I mean, I understand
6 that, but doesn't Congress's use of that phrase
7 in the List Act undercut your argument that
8 eligibility isn't about sovereignty?

9 MR. CLEMENT: No, I don't think so,
10 Your Honor, and I think, again, for two reasons.

11 One is the language is not exactly
12 identical because it -- whenever Congress has
13 talked about "recognition" as meaning only
14 sovereignty in subsequent years after 1990 --
15 rather, 1975, they specifically tethered it to
16 recognition by the Secretary, and I think that
17 brings in the entirety of the -- the -- the
18 process for recognition and its sovereign
19 requirements.

20 And if you go back to 1975, the idea
21 that when Congress was trying to promote
22 self-determination in Alaska, it was going to
23 hinge that on whether the Alaska entities were
24 sovereign doesn't make any sense. Even as to
25 the villages, it took 18 years to figure out

1 whether the villages were sovereign. So --

2 JUSTICE BARRETT: I mean, I can see
3 that, but it's kind of at war with the -- the
4 plain meaning of the text if it's understood to
5 be a term of art. And, I mean, I take your
6 point that maybe it wasn't a term of art when
7 ISDA was enacted but became so later,
8 particularly after the List Act.

9 But can you think of any other
10 instance in statutory interpretation where
11 something has had its ordinary meaning in the
12 beginning and then gained a term of art where
13 then you interpret statutes differently
14 depending on where they fell along the continuum
15 of that process?

16 MR. CLEMENT: It seems to me -- I -- I
17 can't point you to that, but I would say two
18 things. One is, if a term only becomes a term
19 of art later, let's say 1994, I don't think you
20 would import it backwards to a -- a -- a statute
21 that was enacted earlier.

22 And I still don't think even in 1994
23 that "recognized" as it's used in ISDEAA is a
24 term of art. And the best evidence of that is
25 NAHASDA, which was passed one year later in

1 1995, and it basically mimics the ISDEAA
2 language, and it has been interpreted from day
3 one to include the ANCs, and they got \$40
4 million of funding under it last year.

5 JUSTICE BARRETT: Thank you, Mr.
6 Clement.

7 CHIEF JUSTICE ROBERTS: A minute to
8 wrap up, counsel.

9 MR. CLEMENT: Thank you, Mr. Chief
10 Justice.

11 In the end, whether the eligibility
12 clause has an ordinary meaning that ANCs satisfy
13 or a term-of-art meaning that is wholly
14 inapplicable to them, there is no cause for
15 interpreting ISDEAA or the CARES Act to exclude
16 ANCs and the natives they serve.

17 Alaska natives were eligible for
18 special federal Indian benefits long before the
19 Settlement Act in ISDEAA. Nothing in either
20 statute terminated those benefits or made them
21 turn on membership in a sovereign tribe.

22 To the contrary, the Settlement Act
23 told every Alaska native to enroll not in a
24 village but in a regional ANC. As a direct
25 result of that congressional decision, there are

1 tens of thousands of Alaska natives whose only
2 native affiliation is with an ANC.

3 Cutting ANCs out of ISDEAA's
4 definition would leave those Alaska natives out
5 in the cold. Cutting out ANCs would also
6 destroy Alaska's self-determination success
7 story that depends on cooperation between ANCs
8 and sovereign villages.

9 In short, Alaska is different and
10 Alaska is working. This Court should reverse.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Rasmussen.

14 ORAL ARGUMENT OF JEFFREY S. RASMUSSEN
15 ON BEHALF OF THE RESPONDENTS

16 MR. RASMUSSEN: Thank you, Mr. Chief
17 Justice, and may it please the Court:

18 A unanimous panel of the D.C. Circuit
19 had no difficulty concluding that ANCs do not
20 qualify as Indian Tribes under ISDEAA and -- and
21 thus under the CARES Act. As the court of
22 appeals explained, under basic English sentence
23 construction, the recognition clause
24 unambiguously applies to each of the nouns that
25 precedes it, including each ANC. And by

1 referring to groups recognized as eligible for
2 the special programs available to Indians, the
3 recognition clause plainly refers to the formal
4 recognition -- recognized status.

5 Indeed, the U.S. agreed with that
6 until this case reached this Court. Petitioners
7 contend that the court of appeals'
8 interpretation would render this statute's
9 inclusion of ANCs super -- superfluous.

10 This is wrong for two reasons.

11 First, the cardinal rule is the plain
12 meaning, and the English language construction
13 of the sentence is simple and clear.

14 Second, as Petitioners do not even
15 contest, the political branches could, both in
16 1975 and today, have believed that their plenary
17 authority allowed them to recognize ANCs.

18 Therefore, there is no super --
19 superfluity problem.

20 Nor is the court of appeals'
21 interpretation absurd because the Court could --
22 or the Congress could reasonably believe, when
23 enacting ISDA, that ANCs might be recognized in
24 the future.

25 Petitioners also invoke their doctrine

1 of ratification. That is wrong for three
2 reasons, the primary one being simply that it --
3 that doctrine does not trump the plain meaning.

4 The ANCs warn that, left standing, the
5 court of appeals' decision will deprive Alaska
6 natives of much-needed services and benefits.
7 In actuality, the opposite is true. Alaska
8 native villages provide those benefits to Alaska
9 natives, and the primary example of an ANC doing
10 so, which is CIRI, is authorized by an
11 independent statute.

12 The court of appeals' decision should
13 be affirmed. I welcome the Court's questions.

14 CHIEF JUSTICE ROBERTS: Counsel, your
15 side's fundamental argument is that the text is
16 clear and that that doesn't include -- by the
17 time you get to the end of the sentence, it
18 doesn't include the ANCs.

19 But the text itself, in -- in the
20 middle of the -- the -- the clause, does include
21 the ANCs, and then that same clause, under your
22 reading, takes eligibility away from the ANCs.

23 And my question is, why doesn't that
24 text undermine the plain language argument? In
25 other words, we're not talking about some

1 overriding purpose. We're not talking about
2 legislative history.

3 What we're talking about is the text,
4 and the text says in the list ANCs. And then
5 the text takes away eligibility. And it seems
6 to me that that text creates ambiguity so that
7 it -- a textual reading isn't a plain reading.

8 What -- what's your answer to that?

9 MR. RASMUSSEN: Well, I think we --
10 we've got a couple of answers to that, but I
11 think first is that when Congress was acting in
12 1975, this was completely uncertain. We have
13 from 1971 until 1993 before it became clear.

14 And so there wasn't that -- that
15 certainty. And, certainly, when Congress was
16 enacting the ISDEAA, it did not know. And when
17 Congress doesn't know, this Court has never
18 said, oh, well, you've got to go and figure that
19 out, Congress, and you've got to then come up
20 with the decision now when you enact this
21 statute.

22 Instead, what Congress did here is
23 what it commonly does, which is to provide a
24 series and then a qualifier at the end, and
25 that's to include all of the -- the entities

1 that come before that.

2 And so, in our -- in our brief to this
3 Court, we discuss that in the very next section
4 of the CARES Act Congress does exactly that. It
5 refers to cities, towns, parishes that -- that
6 are over 500,000 people. And Congress, in that
7 case, could have simply looked at a census and
8 said: Oh, parish -- there's no parish over
9 500,000. We should take that out.

10 But, under the ANCs' argument, because
11 it included parishes and then it included a
12 qualifier that plainly didn't apply to parishes,
13 all the parishes should have gotten money.

14 So --

15 CHIEF JUSTICE ROBERTS: Counsel, I
16 don't under -- I'm not sure -- I'm not sure I
17 agree with your argument about the
18 uncertainties. ANCs have never had sovereign
19 authority. They didn't at the time. That was
20 the whole point. This was a revolution in the
21 relationship between the national government and
22 Native American government. These were not
23 governmental organizations. There was no
24 uncertainty at the time. The whole point was
25 that they were not governmental entities.

1 MR. RASMUSSEN: There was certainly a
2 lot of back and forth on that issue during that
3 period of time, so there were then those
4 attempts.

5 Further, it was also very clear that
6 ANCs could assert and that Congress, under its
7 plenary authority, could say we're going to make
8 ANCs tribes. In fact, that has been proposed on
9 occasion.

10 So there -- there's certainly the
11 possibility that ANCs, even if they didn't
12 qualify at that time, could have been --
13 Congress could have enacted something under its
14 plenary power later to say that they were.
15 Whether that would then be permissible would be
16 a separate issue for a later date.

17 CHIEF JUSTICE ROBERTS: Well, why
18 would Congress put ANCs in the language and then
19 take them out? I mean, is it -- is your
20 argument based solely on the uncertainty that at
21 some point in the future the Congress might undo
22 the whole ANCSA approach based on Congress's --
23 Alaska's distinct situation?

24 MR. RASMUSSEN: Well, no. Our -- our
25 argument -- and perhaps the Chief Justice

1 doesn't agree with it -- but we -- we believe
2 that there was substantial uncertainty in 1975.
3 That's certainly what the court of appeals
4 found, that there was sufficient uncertainty.

5 When we're dealing with an act of
6 Congress, we don't expect them to be omniscient
7 here. We don't expect them to make that
8 resolution. We expect them to make sure that
9 they cast a wide enough net, and then they use
10 the exclusion clause or the qualification clause
11 at the end to then eliminate those who wouldn't
12 qualify.

13 And that has the concept that is
14 essential here. And the Alaska native
15 corporations then don't match that essential
16 concept.

17 CHIEF JUSTICE ROBERTS: Justice
18 Thomas.

19 JUSTICE THOMAS: Thank you, Mr. Chief
20 Justice.

21 Counsel, why do you think the Congress
22 cross-referenced ISDA rather than simply the
23 list of recognized tribes?

24 MR. RASMUSSEN: Well, there are a
25 number of statutes that define Indian Tribes

1 that Congress could have incorporated certainly.
2 You know, obviously, from the Tribes'
3 perspective, we would have rather they
4 specifically incorporated the List Act, but our
5 view is that the -- after 1993, it's clear that
6 the -- the ISDA really incorporates that concept
7 itself. So there wasn't a problem.

8 Further, in the CARES Act itself,
9 Congress then references the recognized
10 governing body of an Indian Tribe. So, again,
11 it was reiterating that recognition concept in
12 the CARES Act itself, which is why the Ute
13 Tribe, the one that I represent primarily,
14 although I'm representing all tribes here today,
15 the Ute Tribe views this as something that it --
16 it would be better to decide this case more
17 narrowly.

18 JUSTICE THOMAS: The -- Mr. Clement
19 made quite a bit of the broader recognition
20 language in the D.C. Circuit's opinion, and he
21 focused more on the language, "recognized as
22 eligible" language.

23 Would you respond to his argument a
24 bit and what you think is a -- is a refutation
25 of his argument?

1 MR. RASMUSSEN: Well, I think that the
2 primary one is, yes, from 1975 to 1993, there
3 was this uncertainty. 1993 makes that crystal
4 clear, that -- that the Alaska native
5 corporations do not qualify under that
6 qualification that is in the List Act. And,
7 they -- therefore, they do not qualify for the
8 same qualification that is within the ISDEAA.

9 We note the United States, until now,
10 has been saying that same exact thing all
11 through this case. Now they've got an
12 alternative argument that's no better, but
13 they've been saying that themselves, that they
14 don't qualify.

15 JUSTICE THOMAS: And what do you make
16 of the -- of the ratification argument?

17 MR. RASMUSSEN: Well, ratification, we
18 -- we -- as we view it, there are three -- three
19 main issues, and I alluded to one in my opening,
20 which is simply that ratification -- this
21 Court's decisions are very clear that
22 ratification simply does not trump plain
23 meaning.

24 Also, to have ratification, you would
25 have to have something that is well settled and

1 known to Congress, and we don't have that here.
2 In fact, what we have is a lot of things that --
3 in my view, most of the things are on the other
4 side. They can point to one 1976 memo, and --
5 and then there's a number of other things that
6 point the exact opposite way. So we don't see
7 how they meet any of the three elements for
8 ratification.

9 JUSTICE THOMAS: In your brief, you
10 seem to -- and I could be wrong -- you seem to
11 make a distinction between Indian Tribes and
12 people of Native American ancestry. What
13 difference would that make, if any?

14 MR. RASMUSSEN: When we -- the
15 recognized tribes, the ones that the United
16 States owes the trust duty to, then established
17 their membership. And that happens in Alaska as
18 well. And so those are the people that have the
19 -- the trust relationship through their tribe
20 with the United States. So, when we're talking
21 about trust responsibilities, that's what we're
22 talking about.

23 So, you know, the ANCs have numerous
24 people who for whatever reason are not members
25 of tribes. We agree with Mr. Clement there.

1 But that -- that happens everywhere. There is
2 millions, actually, of people who say they're
3 Native American in the lower 48 who are not
4 members of tribes. That's not an uncommon
5 thing.

6 But this Court has always said tribes
7 define their membership and then the federal
8 recognition establishes the trust
9 responsibilities. And so that's where -- how
10 you have the trust responsibilities flowing to
11 enrolled members of tribes.

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer.

15 JUSTICE BREYER: Good morning. Thank
16 you.

17 Imagine you work for a company that
18 sends people subscription requests, you know,
19 they keep information about subscriptions to
20 vast numbers of publications, and I write back,
21 you get this letter, and you're in charge of
22 filling requests, Dear -- et cetera -- I would
23 like more information about any newspaper,
24 including The Atlantic Monthly, which is
25 published daily.

1 Would -- would you be at a loss as to
2 how to fill that request?

3 MR. RASMUSSEN: I'm sorry, Justice
4 Breyer, it became muddled when you were giving
5 me the example.

6 JUSTICE BREYER: The example is you
7 get a letter from me or from somebody that says
8 please send me more information about any
9 newspaper on your list, including The Atlantic
10 Monthly, which is published daily.

11 I'm just asking you if you'd -- if
12 you'd have a problem giving me what I want. Is
13 it you wouldn't know what I want?

14 MR. RASMUSSEN: No, I think, in that
15 -- in that case, you would. I think that's
16 where you get into whether what Congress did
17 here was absurd.

18 JUSTICE BREYER: Yeah. Well, no, no,
19 it's not absurd. Is my question absurd? Do you
20 have a problem?

21 MR. RASMUSSEN: No, that's my point,
22 is that your question is not, but when you apply
23 that to the ISDEAA and you say would it be
24 absurd here to do that, yes, it would -- it
25 would be absurd.

1 JUSTICE BREYER: I'm just asking if
2 you'd have trouble filling my request, and I
3 think your answer is no. Very well.

4 MR. RASMUSSEN: Well --

5 JUSTICE BREYER: Then you take it home
6 and you show it to your cousin, who is the
7 world's greatest grammarian, and you say, see
8 the kind of bad grammar I get. And he says,
9 you're right to call that poor grammar, bad
10 grammar, but not incorrect grammar. It's not
11 good, but it's far from perfect.

12 And I ask you that only because I've
13 never heard of a canon that says you have to use
14 perfect grammar or even that you have to use
15 good grammar when you are a member of Congress.

16 What do you think?

17 MR. RASMUSSEN: Right. Well, I would
18 agree that it's not that we -- and I'm sure the
19 Court knows this better than me -- we don't
20 expect Congress to use perfect grammar. If we
21 did that in this case, we wouldn't have had a
22 problem if they used perfect grammar. But what
23 we do for the legal analysis is we start from
24 the plain text from what they wrote down.

25 And what they wrote down is actually

1 clear on the grammar. And then, when we get to
2 should there be some reason that we don't apply
3 this plain language, here, we would be left
4 with, well, it would have to be so bizarre that
5 Congress could not have meant -- meant what it
6 said. You know, we know literally what it said.

7 JUSTICE BREYER: Thank you.

8 MR. RASMUSSEN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: Mr. Rasmussen, suppose
11 that the definition of "Indian Tribe" in the
12 CARES Act had never been used before. It had
13 not been used in the ISDA. It had not been used
14 in any prior statute. It was crafted by
15 Congress and put in the CARES Act. And the
16 CARES Act provides a one-time distribution of
17 money, and at the time of the enactment of the
18 CARES Act, no ANC had been recognized in the
19 sense that you think is necessary.

20 How then would you account for the
21 reference to ANCs in the definition of an Indian
22 Tribe? Would you make the same argument, or
23 would your argument have to be different?

24 MR. RASMUSSEN: Well, we'd make the
25 same argument, but still you'd have the clear

1 language, you know, if you were dealing with
2 something that is going to be a one-time
3 statute, as we are here with the CARES Act, I
4 think that that does change the analysis some,
5 but we would still be making the same argument.

6 JUSTICE ALITO: Well, how could you
7 make the same argument? Because then the -- the
8 clause that refers to the -- to ANCs wouldn't be
9 surplusage, it would be -- it would be absurd?

10 MR. RASMUSSEN: Yeah, I -- I -- I
11 think that you could say -- right, that's --
12 that's where I'm saying I think that their stand
13 -- the standard they would have to meet here is
14 absurd, but --

15 JUSTICE ALITO: Well, it would be --
16 it would be --

17 MR. RASMUSSEN: -- I do not think that
18 that is absurd in that case.

19 JUSTICE ALITO: -- it would be absurd,
20 would it not?

21 MR. RASMUSSEN: Only if Congress knew
22 all of that information, right.

23 JUSTICE ALITO: Well, Congress didn't
24 -- Congress didn't know it was making a one-time
25 distribution of funds? Congress didn't know or

1 we should not presume that Congress was aware
2 that no ANC had been recognized in the sense
3 that you think is important?

4 MR. RASMUSSEN: Again, I think that I
5 -- you're asking me what our argument would be,
6 and our argument would still be the same. We
7 would, though, have a much -- a much, much more
8 difficult argument on absurdity in that -- in
9 that context than we have now.

10 JUSTICE ALITO: Well, you would not --
11 not just have a more difficult argument on
12 absurdity, you would have an impossible argument
13 on absurdity because you would have a clause
14 that means nothing, that contradicts the meaning
15 that you ascribed to this provision, right?

16 MR. RASMUSSEN: Well, I -- we -- we
17 would disagree on that, but, yeah, I can
18 understand where a court would come out with
19 that decision, yes.

20 JUSTICE ALITO: Well, how do you
21 disagree? You say that no A -- an A -- in order
22 to be eligible for these funds, an entity has to
23 be recognized in a certain sense. No ANC had
24 been recognized in that sense at the time when
25 Congress made this one-time distribution of

1 funds. And yet Congress referred to ANCs in the
2 definition of groups that are eligible for these
3 funds. There's a blatant contradiction.

4 MR. RASMUSSEN: Yes, I -- I would
5 agree in that context there is, and that's why I
6 do think that, you know, I -- again, I could
7 imagine a court saying that is absurd. I
8 wouldn't say that is absurd because I think,
9 again, the plain language and the complexity of
10 this is sufficient that, if Congress wants to,
11 you know, over-include and then use a qualifier
12 at the end to eliminate things, that's how we
13 often draft statutes.

14 We don't go and do that research to
15 find out what exactly -- whether there would be
16 any possibility of an ANC qualifying. The
17 Congress wouldn't do that.

18 JUSTICE ALITO: Suppose Congress says
19 any person over the age of 21 is eligible for
20 something. However, nobody between the ages of
21 30 and 32 is eligible for this. You have
22 contradictory provisions.

23 MR. RASMUSSEN: Right.

24 JUSTICE ALITO: All right. Let me
25 come back to my -- my example. Is there any

1 reason why we should not analyze the CARES Act
2 as if the definition of an Indian Tribe had been
3 created for that purpose and in -- instead of
4 incorporating by reference a definition that was
5 adopted at -- at a different time? Do you see a
6 difference between those two things?

7 MR. RASMUSSEN: I see that the CARES
8 Act itself then -- then incorporates that
9 requirement of recognition within itself.
10 That's where our view is that, instead of trying
11 to make a broad decision and going on to all
12 these other briefs that discuss all these
13 extraneous issues, we should be looking at the
14 CARES Act itself, which includes that concept of
15 recognition, and we all know what that concept
16 of recognized Indian Tribe means.

17 JUSTICE ALITO: But you would escape
18 -- you tried to escape absurdity by saying that
19 when the ISDA definition was adopted, there was
20 a possibility that ANCs would be recognized in
21 the relevant sense, and at some point in the
22 future, Congress might decide to recognize ANCs
23 in that sense.

24 But, when you just look at the time
25 when the CARES Act was adopted, we know that no

1 ANC had been recognized in that sense.

2 MR. RASMUSSEN: Correct.

3 JUSTICE ALITO: All right. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: Counsel, we do
7 keep going around in a circle, and the circle
8 starts with the fact that even the government
9 recognizes, and you must too, that in 1974 the
10 recognition clause could not have meant
11 political recognition because that didn't exist
12 at the time. It only existed in the 1990s. So
13 45 years ago, in 1974 -- is my math right --
14 when ISDA was passed, there was no term of art
15 that you were recognized as a government body.

16 So now what you're arguing, I think,
17 is that's clear today when the CARES Act was
18 passed, but, as Justice Alito just pointed out,
19 then why would Congress have bothered to include
20 ANCs in the CARE Act at all since, after 45
21 years, it clearly knows now that no ANC has ever
22 been politically recognized?

23 Now I think the government's absurdity
24 -- absurdity argument has more force because, in
25 45 years, not a one -- if we accept what the

1 D.C. Circuit said, that in 1974 it was uncertain
2 whether some would be recognized politically,
3 it's clear now it's not going to be.

4 So don't we have to accept
5 Mr. Clement's argument that ISDA's language, as
6 used in the CARES Act, cannot mean political
7 recognition?

8 MR. RASMUSSEN: No, because the CARES
9 Act itself then incorporates that same concept
10 of recognized governing body of an Indian Tribe,
11 and so that's where Congress did include that
12 concept within the CARES Act itself.

13 The concept is also within the ISDA,
14 and we now know, I think, yeah, that no --

15 JUSTICE SOTOMAYOR: Yeah, that's --

16 MR. RASMUSSEN: -- ANCs qualify.

17 JUSTICE SOTOMAYOR: -- actually your
18 strongest argument. And I'm going to hope that
19 in its reply, the government will address that
20 question, which is it may not be the case with
21 some of ISDA's uses in other acts, like the
22 Housing Act, and in other provisions of care,
23 coronavirus care, where that governing body
24 definition isn't included, that one could
25 argue -- take up the recognition argument that

1 Mr. Clement has made more clearly.

2 But perhaps then I'll stop now and let
3 the government pick that up later.

4 CHIEF JUSTICE ROBERTS: Justice Kagan.

5 JUSTICE KAGAN: Mr. Rasmussen, you
6 know, I agree with you that grammar is very
7 important in understanding statutes and that
8 grammar often allows us to choose between two
9 possible meanings of a statute.

10 But you have to have another possible
11 meaning for grammar to serve that function, and
12 the question is whether there really is another
13 conceivable meaning here.

14 So you said there is because Congress
15 in the future could have recognized ANCs.
16 Justice Alito said to you it had never done that
17 in the past. But there's -- there's something
18 even more than that which seems to make this an
19 implausible understanding, which is that, you
20 know, putting aside whether it's theoretically
21 plausible, I mean, ANCs are just different from
22 the Tribes that were recognized at the time.

23 They are nonprofit corporations --
24 excuse me, for-profit corporations. No historic
25 bonds. Members who aren't -- shareholders who

1 aren't members of the tribe. And why should we
2 even think that Congress had that in mind as a
3 possibility at the time to make these federally
4 recognized tribes?

5 MR. RASMUSSEN: What we -- what we
6 have actually is the ANCs themselves saying
7 Congress could do this under its plenary power.
8 Plenary power is very, very broad. And so --

9 JUSTICE KAGAN: Well, I'm not
10 contesting the -- the -- you know, Congress's
11 legal authority to do it. I guess what I'm
12 contesting is the idea that anybody at the time
13 would have thought that Congress would do it.

14 MR. RASMUSSEN: Well, there was --
15 there's certainly been efforts to have the A --
16 some of the ANCs federally recognized, at least
17 a few of them, to have them federally
18 recognized, that there has been that effort.
19 So, you know, to date, those haven't succeeded,
20 but there -- there's by no means certainty.

21 JUSTICE KAGAN: I mean, suppose I
22 thought that there was, you know, a 2 percent
23 chance that Congress would ever do that. What
24 should I do in interpreting the statute?

25 MR. RASMUSSEN: Well, I -- I think, if

1 we go to 1975, there --it was not that there was
2 a 2 percent chance, but, if we go to today, that
3 the whole point of including ANCs is so, if that
4 possibility comes around, there -- and they meet
5 that definition, that they then are qualified,
6 they come in basically on an equal footing to
7 all the other tribes. That's -- that's what --
8 why that is in there.

9 JUSTICE KAGAN: Well, again, if we
10 could just go back to 1975 and ask, like, was
11 there really any realistic prospect that
12 Congress would have included ANCs as -- as
13 federally recognized tribes? And if I say, you
14 know, it's theoretically possible, Congress has
15 the authority to do this, but if you went around
16 and you polled Congress and you said do you
17 think of ANCs as federally recognized tribes,
18 they would say, well, of course not.

19 And -- and -- and say I thought that
20 there was an extremely low probability that
21 anybody thought that that was, you know, a
22 possibility.

23 MR. RASMUSSEN: Well, I -- I think --

24 JUSTICE KAGAN: Then wouldn't they
25 just say, well, look, we can -- you know, it's a

1 -- it's a theoretical possibility that we can
2 put it from our minds and -- and we can say they
3 wouldn't have included this clause about ANCs if
4 they didn't mean to include this clause about
5 ANCs?

6 MR. RASMUSSEN: I think that what --
7 what -- in the example that we used from the
8 CARES Act itself, that Congress does this in
9 statutes. It -- the -- when it casts its net
10 and then it includes a qualifier, it's letting
11 the qualifier do that work for it instead of
12 making those decisions.

13 I mean, if Congress had not included
14 ANCs in that particular act, then it would be
15 saying, yeah, ANCs can never qualify. But it
16 didn't do that. Instead, it gave that as the
17 possibility if they would meet the qualifier.

18 JUSTICE KAGAN: Thank you.

19 MR. RASMUSSEN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch.

22 JUSTICE GORSUCH: Mr. Rasmussen,
23 first, I'd like you to address kind of a
24 practical question. Your brief was -- expressed
25 concern that ruling for the ANCs would allow a

1 sort of double-dipping, that they'd be counted
2 twice for purposes of the CARES Act.

3 Mr. Clement responded to that concern
4 this morning by suggesting that the federal
5 government has lots of ways to administratively
6 ensure that that doesn't occur.

7 If that's right, it's hard to see what
8 we're fighting about here. Can you explain your
9 views?

10 MR. RASMUSSEN: Well, what we know is
11 that the United States has reserved -- I think,
12 if I recall correctly from our brief, it's in a
13 footnote in our brief and also in a footnote in
14 Utah's brief --

15 JUSTICE GORSUCH: About 530 million
16 dollars.

17 MR. RASMUSSEN: Well, about 71 million
18 dollars, if I recall correctly, was allocated to
19 the population of ANCs. And to the extent ANCs
20 have tribal members in them -- that is, enrolled
21 Indians in them -- those members -- enrolled
22 Indians have already been counted.

23 There's nothing in the record to
24 explain how the United States came up with this
25 large figure for the population of ANCs, but

1 whatever it would be would either be
2 double-counting or would be people who are not
3 Indian, who are not enrolled Indians.

4 JUSTICE GORSUCH: All right. Then let
5 me -- let me try my question again, though.
6 Mr. Clement says there are administrative ways
7 to deal with that problem and that, therefore,
8 we're really fighting over nothing here.

9 Why isn't that correct?

10 MR. RASMUSSEN: Well, right now, I
11 would say it's not correct because, when we're
12 dealing with the CARES Act, there is -- the --
13 the -- the allocation has already been
14 formulated. But, more broadly, to the extent
15 that, again, even -- no matter where we are, to
16 the extent that there are non-enrolled people of
17 Indian descent, they are not Indians for federal
18 Indian law purposes.

19 And the Indians are the ones that are
20 enrolled in the tribes in Alaska. People who
21 are of Indian descent and have -- can meet the
22 enrollment criteria of any tribe in Alaska can
23 become enrolled in the tribe in Alaska and
24 establish that government-to-government --

25 JUSTICE GORSUCH: All right.

1 MR. RASMUSSEN: -- relationship.

2 JUSTICE GORSUCH: Allow -- allow me to
3 move to a different set of questions if I might.

4 The CARES Act speaks of tribal
5 governments, and I asked Mr. Clement, is that an
6 awkward fit with ANCs, for-profit corporations?
7 And he suggested no, that it's entirely possible
8 that native tribes in the lower 48 could
9 organize themselves in a similar fashion.

10 What -- what are your thoughts about
11 that?

12 MR. RASMUSSEN: That -- well, it is a
13 very awkward construction given that Title 5 is
14 all about governments, including tribal
15 governments, including the recognized governing
16 bodies of Indian Tribes. So we've got this
17 concept of government within that -- that
18 section repeatedly.

19 The money -- what we're dealing with
20 here is really -- and this goes back a little to
21 your last question -- what we're dealing with
22 here is whether that money goes directly to the
23 Indian Tribes, who then make the decision
24 whether to provide it to, for example, ANCs who
25 are doing services that benefit their members,

1 or whether it goes to the ANCs directly, cutting
2 out the tribes and eliminating their ability to
3 make that decision.

4 And so, in the lower 48, that's
5 exactly what's going on. The money went to the
6 tribes. The tribes made the decisions. They
7 can give it out to tribal organizations, similar
8 to ANCs, if they want to and if those ANCs were
9 providing valuable services.

10 There are a few of them that are, but
11 what we've got here is a decision that every ANC
12 qualifies, and every ANC is going to get, you
13 know, at least \$100,000, and some of them are
14 going to get tens of millions.

15 JUSTICE GORSUCH: And -- and just to
16 return to a question that Justice Thomas posed
17 that I'm not sure I got the answer to, if -- if
18 effectively this recognition clause asks us to
19 -- to inquire whether the tribe's recognized,
20 why didn't Congress just cross-reference the
21 List Act?

22 MR. RASMUSSEN: It -- it -- it could
23 have. If Congress -- you know, the fact that
24 Congress doesn't --

25 JUSTICE GORSUCH: But it didn't. But

1 it didn't. It -- it -- it -- it
2 cross-referenced a different statute. What
3 should that difference tell us? You're saying
4 --

5 MR. RASMUSSEN: Nothing.

6 JUSTICE GORSUCH: -- nothing, I
7 believe.

8 MR. RASMUSSEN: Yeah, nothing.

9 JUSTICE GORSUCH: Isn't that awkward?

10 MR. RASMUSSEN: No, I don't think it
11 is at all because I think we now have clarity of
12 what that definition means. And so, when we
13 look at the other statutes where that is used,
14 as we discussed and as the National Congress of
15 American Indians discusses in depth in their
16 brief, when that statute -- that statutory
17 definition is used, it's often very clear that
18 it's excluding ANCs.

19 So we do have some clarity on -- you
20 know, that this is a -- a statute that is
21 regularly used when it does not include ANCs --

22 JUSTICE GORSUCH: Thank --

23 MR. RASMUSSEN: -- because that's what
24 it means now.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh.

3 JUSTICE KAVANAUGH: Thank you, Chief
4 Justice.

5 Good morning, Mr. Rasmussen. I want
6 to give you an opportunity to respond to how I
7 think the two statutory arguments on the other
8 side merge potentially.

9 So it seems to me, if we start with
10 the text and we look at "recognized as
11 eligible," we have a choice. Do we read that in
12 its ordinary meaning, as Mr. Clement says, or do
13 we read it as a term of art?

14 And that's a choice we have, and we
15 have to figure out, how do we resolve that? And
16 one of the ways we usually resolve that is
17 looking at the context to see how Congress might
18 have been using the phrase here.

19 And once we broaden out the lens and
20 look at the context, we see the express
21 inclusion of the ANCs and we see that they would
22 be left out completely, meaning many tens of
23 thousands of native Alaskans would be left out
24 completely not only from the CARES Act but from
25 many other social services statutes.

1 So, given that context, if that's
2 correct, why doesn't that absurdity or oddity or
3 whatever you want to call it help influence the
4 choice we have to make between whether to follow
5 ordinary meaning or term-of-art meaning for the
6 phrase "recognized as eligible"?

7 MR. RASMUSSEN: Well, I -- I think you
8 -- in the question, you have bought into a
9 couple of the incorrect statements made by the
10 ANCs in this case.

11 No Indian -- no person who is a member
12 of a federally recognized tribe was not already
13 counted when the Congress -- when the Treasury
14 divided the money amongst the Indian Tribes.

15 So, when they're referring to Indians,
16 they're referring to people who are not enrolled
17 in any Indian Tribe. They don't have that
18 political relationship with the United States.

19 And they're also --

20 JUSTICE KAVANAUGH: Those people are
21 Alaska natives, correct?

22 MR. RASMUSSEN: They are Alaska
23 natives.

24 JUSTICE KAVANAUGH: And Alaska -- why
25 are you treating Alaska natives as kind of

1 second class?

2 MR. RASMUSSEN: We -- we are not.
3 This is -- again, this is actually more common
4 in the lower 48 states, that there are numerous
5 people who are not members of tribes who are
6 Indian, that they can be full-blood Indian even
7 and still not be enrolled in a tribe, that
8 that's not an uncommon thing. And that can
9 happen in Alaska too.

10 And if they -- those people wanted to
11 enroll in an Indian Tribe and they met the
12 qualifications for enrollment in an Indian
13 Tribe, they can do that. And then Congress
14 apportioned this money to the government and the
15 government, so the Indian government --

16 JUSTICE KAVANAUGH: But, just -- just
17 to focus again on the question, we have a choice
18 of how to read the phrase "recognized as
19 eligible."

20 MR. RASMUSSEN: Mm-hmm.

21 JUSTICE KAVANAUGH: And when we figure
22 out do we go ordinary meaning or we go term of
23 art on that, it seems that the express inclusion
24 of the ANCs, and given some of the points that
25 have been made, no one thought the ANCs would

1 ever be politically recognized now or then or in
2 the future, doesn't that help us choose ordinary
3 meaning rather than term-of-art meaning here so
4 as to avoid that oddity, that absurdity, et
5 cetera?

6 MR. RASMUSSEN: Well, the -- in the
7 ISDEAA, it doesn't just say recognized. It goes
8 on to explain what that means. And then, in
9 1993, Congress -- the United States adopts the
10 -- the List Act and uses that same exact phrase
11 to then say these are the tribes that we're
12 referring -- these are the entities we're
13 referring to. We're going to list them so that
14 everybody knows. That was what that was
15 designed to do, was to provide that clarity for
16 everybody, and that's what it does.

17 JUSTICE KAVANAUGH: And on the -- on
18 the ratification argument, you said, well, that
19 doesn't apply when there's a plain meaning. But
20 I'm not sure we have a plain meaning. And your
21 argument's really not plain meaning because
22 you're relying on a term-of-art construction of
23 "recognized as eligible."

24 MR. RASMUSSEN: We're -- we're only
25 relying -- I -- I view it as -- and, certainly,

1 we -- the interpretation of the ISDEAA, you
2 could use a plain meaning or a term-of-art
3 meaning in order to get at this answer.

4 What it's using is a term that later
5 becomes the term that is used frequently and
6 that Congress then has the United States define
7 through the List Act and define the members that
8 meet that qualification, that meet --

9 JUSTICE KAVANAUGH: And let --

10 MR. RASMUSSEN: -- that definition.

11 JUSTICE KAVANAUGH: -- let me ask one
12 other thing. The amicus briefs from Senators
13 Murkowski and Sullivan and Congressman Young,
14 from the Alaska Federation of Natives, from the
15 State of Alaska, from Cook Inlet, they used
16 terms like "stunning," "egregious,"
17 "destabilizing," "staggering," in terms of the
18 effects that an affirmance would have on this
19 program but also many other programs.

20 Now they know Alaska. They know how
21 these statutes fit together. The members of
22 Congress from Alaska are -- are appropriately
23 attentive to this. Why are they wrong in
24 describing the consequences of choosing the term
25 of art over ordinary meaning?

1 MR. RASMUSSEN: Well, I -- I think,
2 you know, I would not question that they know
3 Alaska, but I think they also are motivated by
4 getting \$533 million up into Alaska instead of
5 into the lower 40 -- mostly into the lower 48
6 states, divided amongst all the tribes. They're
7 -- so that's part of what they're doing.

8 But, when we look at the record in
9 this case and the examples that they use, those
10 are not accurate.

11 For example, CIRI, as the United
12 States forthrightly admits, there -- there --
13 there aren't very many of these ISDEAA contracts
14 in Alaska. You get the exact opposite
15 impression from all of the other briefs by the
16 Petitioners and their supporters --

17 JUSTICE KAVANAUGH: Thank you.

18 MR. RASMUSSEN: -- but there are very
19 few.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett.

23 JUSTICE BARRETT: Mr. Rasmussen, I
24 want to be sure that I understand your position.
25 You told Justice Thomas and then I think you

1 repeated again to Justice Kavanaugh that what it
2 takes to establish a trust relationship between
3 a native Alaskan or a Native American from the
4 lower 48 is enrollment in a tribe.

5 Did I understand that correctly?

6 MR. RASMUSSEN: The -- the common way
7 of doing it now is enrollment, that it would be
8 enrolled or enrollable under almost every tribe
9 because they have status.

10 JUSTICE BARRETT: Okay. Well, then
11 what do we make -- I'm going to read you this
12 language from ANCSA, and I'm wondering how to
13 fit that in with your theory.

14 It says: "Alaska natives shall remain
15 eligible for all federal Indian programs on the
16 same basis as other native Americans
17 notwithstanding any other provision of law."

18 I would take that to mean that because
19 of Alaska's unusual, indeed, very distinct
20 method of handling benefits to native Americans,
21 that that amendment to ANCSA makes clear that
22 that trust relationship exists even though they
23 don't enroll in tribes. Am I wrong about that?

24 MR. RASMUSSEN: Yes, I would say that
25 that is incorrect, that even if you get to

1 commerce clause issues, that you simply can't go
2 that far. But, in the --

3 JUSTICE BARRETT: I don't understand.
4 Why?

5 MR. RASMUSSEN: Okay. Well, in -- in
6 the ANCSA, what it is doing is saying on the
7 same basis as others, and that same basis, as we
8 all know now, is enrollment.

9 It -- it -- at the point in time when
10 that happens --

11 JUSTICE BARRETT: So -- so is your
12 position that native Alaskans have no right to
13 any benefits, even though they are -- even
14 though they are automatically put in ANCs if
15 they don't enroll in Alaskan villages, you know,
16 the equivalent of tribes, it's your position
17 that despite this language in ANCSA they're
18 entitled to nothing from the federal government?

19 MR. RASMUSSEN: No, it's not our
20 position they're entitled to nothing from the
21 federal government because they're --

22 JUSTICE BARRETT: As Indians, not as
23 Alaskan citizens or American citizens. I'm
24 saying, as Indians, it's your position that they
25 are treated differently if they don't enroll in

1 a village?

2 MR. RASMUSSEN: No. That -- that is
3 not our position, that many of the programs that
4 we are talking about, so, for instance, NAHASDA,
5 the housing program, and many of these other
6 programs --

7 JUSTICE BARRETT: Mr. Rasmussen, I
8 think you're not understanding my question. You
9 asserted broadly that the trust relationship
10 between the United States and a native person is
11 established when that native person enrolls in a
12 tribe.

13 And I took you to be saying that the
14 United States doesn't have any kind of trust
15 obligation to a native person who is unenrolled.
16 And you invoked the example of those who live in
17 the lower 48 who have not affiliated with any
18 tribe, although it strikes me as different
19 because native Alaskans, it's not just a
20 free-floating group that self-identifies but are
21 put into as shareholders in ANCs if they choose
22 not to enroll in a village.

23 So I'm trying to understand how to
24 reconcile what you said with this language in
25 ANCSA, and you're referring to other statutes

1 apart from ANCSA.

2 MR. RASMUSSEN: What -- what I'm
3 referring to is that in -- within the ANCSA, it
4 is saying on the same basis as other tribes.
5 And that then does bring in that -- that concept
6 of, well, if you want to be -- have that
7 relationship, you have to enroll in a tribe.
8 There are 220 tribes up in Alaska, and you have
9 to enroll in one of them.

10 JUSTICE BARRETT: And it's your
11 position that every native Alaskan is eligible
12 for membership in one of those tribes? That
13 wasn't my understanding.

14 MR. RASMUSSEN: I don't know whether
15 they are or not. That -- whether they are --
16 whether they would be would be -- would be up to
17 the tribes, and there's, you know, like --

18 JUSTICE BARRETT: So every native
19 Alaskan who's unaffiliated with a tribe but is a
20 shareholder in an ANC isn't eligible for
21 benefits as -- you know, as Indians?

22 I mean, it's not just about what
23 intermediary you receive those benefits through
24 or whether you receive them directly from the
25 BIA or another federal entity. You're saying

1 that they are then no different than, say, any
2 other citizen of Alaska that is not native
3 Alaskan?

4 MR. RASMUSSEN: Well, I'm having
5 trouble communicating this, but there are other
6 programs that do extend more broadly than to
7 enrolled members of tribes, that include people
8 -- for example, NAHASDA, that includes people
9 who are members of state-recognized tribes. And
10 there are -- NAHASDA, I believe, includes some
11 similar language that would incorporate --

12 JUSTICE BARRETT: Let me just shift
13 gears before my time expires, Mr. Rasmussen.

14 You were -- earlier in your argument,
15 you were saying -- characterizing this as
16 somewhat of a dispute when Justice Gorsuch was
17 asking you about double-counting, about who
18 delivers the benefits, whether it's the villages
19 or the ANCs.

20 But isn't this really about whether
21 the lower 48 are allocated more money; in other
22 words, that the primary dispute here isn't about
23 governance or who serves as the intermediary or
24 the ANCs being able to trump how the villages
25 might decide things but what piece of the pie

1 goes where?

2 MR. RASMUSSEN: No, our view is that
3 this is a fundamental question about tribal
4 sovereignty and that the tribes are the
5 sovereigns. Congress was giving the money to
6 the sovereigns for them to make the decision
7 that would --

8 JUSTICE BARRETT: My time has expired.
9 Thank you.

10 MR. RASMUSSEN: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Rasmussen,
12 we have a little bit of time left for any
13 questions my colleagues may have that they
14 didn't get a chance to get to.

15 And I'll -- I'll start us off. I want
16 to follow up on the question Justice Barrett and
17 Justice Kavanaugh were asking because I thought
18 that's what the case was really all about.

19 In other words, there are Alaska
20 natives who are not enrolled members of a
21 village who receive significant services from
22 ANCs, services that the availability of what is
23 directly impacted by the COVID pandemic.

24 And tens of thousands of people fit
25 that description. And I -- I understand you're

1 -- you're doing what lawyers do, which is
2 trying, you know, to get more money for your
3 clients. But the enrolled members receive those
4 benefits and, if you prevail, I gather, will
5 receive more. But the Alaska natives who
6 benefit from the services provided by the ANCs
7 will get -- will get nothing.

8 And I just wonder if that's what
9 Congress -- and maybe, you know, your plain
10 language argument, maybe the answer is that,
11 well, that doesn't matter, but I wonder if
12 there's anybody in Congress who would think that
13 Alaska natives receive significant benefits if
14 they're enrolled in a tribe but not if their
15 benefits are provided through the ANCs.

16 I did not understand Congress to be
17 sort of pushing in favor of enrollment at the
18 expense of participation by ANCs.

19 MR. RASMUSSEN: Again, that there are
20 significant -- excuse me -- there are
21 significant programs that are of benefit to
22 tribal members and others who are affiliated
23 with -- with the tribe.

24 That money goes through tribes. Then
25 how the tribes are permitted to spend that

1 money, whether they can provide it to, for
2 example, members of their community who are not
3 enrolled or others, is determined by the
4 specific statutes at issue. There are a number
5 of statutes that certainly permit them to do
6 that.

7 In this particular case, what we have
8 -- and I think that one fundamental problem that
9 we have here is that the actual record in this
10 case only shows three ISDEAA contracts that are
11 under a separate statute for cadastral surveys.
12 The ANCs own the land and so the cadastral
13 survey, they have the authority to -- to obtain
14 that money.

15 The only other one we have of record
16 is CIRI, and as we've talked about, that has a
17 special statute. So the parade of horrors
18 that they provide of, oh, this is going to
19 deprive people of money or services, is simply
20 false.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 MR. RASMUSSEN: There is no --

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Any of my other colleagues have

1 remaining questions?

2 (No response.)

3 CHIEF JUSTICE ROBERTS: Okay. Take a
4 minute to wrap up, Mr. Rasmussen.

5 MR. RASMUSSEN: Thank you, Your Honor.

6 Again, our view is that the plain
7 language is the touchstone. This Court has said
8 that repeatedly. The plain language is the
9 touchstone for making these decisions.

10 We don't go to ratification. We don't
11 go to other doctrines when the language is
12 plain. This sentence construction here is very
13 clear, and, therefore, the court below was
14 correct when it said this is what -- how this
15 case should be decided.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Guarnieri, rebuttal?

20 REBUTTAL ARGUMENT OF MATTHEW GUARNIERI
21 ON BEHALF OF THE PETITIONER IN CASE NO. 20-543

22 MR. GUARNIERI: Thank you, Mr. Chief
23 Justice. I have just a couple of points to
24 make.

25 First, with respect to our primary

1 argument, that is, the argument that if the
2 recognition clause is understood to refer to
3 formal political recognition, then it should not
4 be read to apply to ANCs, I think, really, the
5 -- the pivot point for that argument, as the
6 questions this morning have made clear, is
7 whether you think there was any evidence of
8 uncertainty about the status of ANCs when
9 Congress enacted that language in 1975.

10 And neither the court of appeals nor
11 Respondents have ever identified any evidence
12 that Congress was at any time uncertain about
13 the sovereign status of ANCs.

14 And there's textual evidence in ISDA
15 to that effect. I mean, the ISDA definition
16 recites that ANCs were established pursuant to
17 ANCSA. So it's entirely implausible to think
18 that Congress itself was uncertain about the
19 sovereignty or, I should say, lack of
20 sovereignty about these corporations that
21 Congress itself had established in a -- in a
22 then-recent federal law.

23 Certainly, there was no doubt about
24 that point in 2020 when Congress enacted the
25 CARES Act and incorporated into it the ISDA

1 definition.

2 And as I think Justice Alito's
3 perceptive questions have pointed out, I mean,
4 it makes no sense to think that the CARES Act
5 incorporated for a -- purposes of a one-time
6 distribution of funds, the CARES Act
7 incorporated a definition under which ANCs would
8 be included only if at some theoretical point in
9 the future Congress chooses to fundamentally
10 reinvent the concept of recognition and
11 recognize as eligible for
12 government-to-government relations these private
13 corporations.

14 Now the second point I want to address
15 is the CARES Act language about the definition
16 of a tribal government. The CARES Act defined
17 the tribal government in terms that are almost
18 word-for-word identical to the definition of a
19 tribal organization in ISDA.

20 And as the district court explained at
21 pages 68 to 70 -- 68A to 70A of the appendix,
22 ANCs have long been understood to -- to have --
23 to have a recognized governing body for ISDA
24 purposes, and so too they have a recognized
25 governing body for CARES Act purposes.

1 And third, with respect to our
2 alternative argument, I mean, Mr. Clement has --
3 has ably addressed that argument. And -- and I
4 would just add that, you know, our -- our -- our
5 point is simply that it's possible that
6 different entities could demonstrate that they
7 are recognized as eligible to -- to participate
8 in ISDA contracting in different ways.

9 For the lower 48 states, the paradigm
10 is acknowledgment by the federal government.
11 But, for ANCs, Congress has already deemed them
12 to be eligible by including them in this special
13 Alaska clause in the ISDA definition.

14 And then, finally, on the
15 practicalities, I mean, many thousands of Alaska
16 natives are not enrolled members of a federally
17 recognized Indian Tribe, and that's by design
18 and that's how Congress set it up in ANCSA.

19 And a decision finding that ANCs are
20 ineligible to receive these CARES Act funds and
21 potentially ineligible to participate in the
22 many other federal programs that rely on the
23 same language as the ISDA definition would have
24 serious, serious consequences for the delivery
25 of federal services and benefits to Alaska

1 natives. It would disrupt the status quo that
2 has prevailed for -- for decades.

3 And we ask this Court to reject that
4 interpretation and to reverse.

5 CHIEF JUSTICE ROBERTS: Thank --

6 MR. GUARNIERI: Thank you.

7 CHIEF JUSTICE ROBERTS: -- thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 11:44 a.m., the case
10 was submitted.)

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